OAH 4-3600-20809

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth, Allen Johnson, et al., Petitioners

ORDER ALLOWING FEES AND EXPENSES

This matter came before Administrative Law Judge Bruce H. Johnson ("ALJ") on November 28, 2012, on the Application by Petitioner Douglas Michog, on behalf of all the Petitioners, for fees and expenses pursuant to Minn. Stat. § 14.472(a). The Application, along with supporting affidavits, were filed on September 17, 2012. The issues were joined when the Respondent Public Employees Retirement Association (PERA) filed objections to the Application on October 1, 2012. The OAH hearing record remains open pending further proceedings directed by the ALJ.

Elizabeth A. Storaasli, Dryer Storaasli Knutson & Pommerville, Ltd., appeared on behalf of the Petitioners. Kevin Finnerty, Assistant Attorney General, appeared on behalf of the Board of Trustees of the Public Employees Retirement Association (PERA).

The parties stipulated that no genuine issue of material fact exists with respect to whether, as a matter of law, the Petitioners are entitled to an order allowing fees and expenses. However, if the Petitioners are entitled to such an order, issues of fact exist with respect to the amounts of fees and expenses that the Petitioners may recover. The ALJ therefore bifurcated the hearing into two stages and heard argument on November 28, 2012, on whether the Petitioners are entitled to an order allowing fees and expenses pursuant to Minn. Stat. § 14.472(a). The record on that first stage of the hearing closed on December 7, 2012, when all post-hearing submissions were received.

FINDINGS

1. The ALJ incorporates all of the findings made by the Minnesota Court of Appeals in *In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth*, 820 N.W.2d 563 (Minn. App. 2012), particularly those findings specifically set forth below.

2. During the past two decades, the city has compensated some of its employees with monthly payments that supplement their regular salaries. The city first agreed to pay supplemental compensation in a 1995–96 collective-bargaining agreement (CBA) with one of its unions. Beginning in 1997, the city agreed to make similar monthly payments of supplemental compensation to members of four other

unions. Initially, the city agreed to make monthly payments of $25 to each represented employee's qualified deferred-compensation plan. In subsequent CBAs, the city increased the monthly payments several times until they reached $229 in 2009.[1]

3. [T]he city is required to report salary information to PERA each pay period and to remit contributions to its employees' retirement plans. [Citation omitted.] From 1995 to 2007, the city included both the salary-supplement payments and the insurance-supplement payments in its calculations of so-called "PERA salary." The city relied on PERA staff when deciding to include the supplemental payments in PERA salary.[2] The city discontinued the practice of including supplemental payments in PERA salary in September 2007.[3]

4. Even if [one assumes] that PERA's interpretation of subdivision 10 is applicable to the facts of this case, [one] cannot conclude that it is longstanding, for several reasons. First, PERA's purported longstanding interpretation of the statute is of uncertain origin. There is no evidence in the record as to exactly when PERA adopted the interpretation of the statute that was applied to the city's salary-supplement payments. Without knowing the date of its adoption, it is difficult to conclude that the interpretation is longstanding. Second, PERA's interpretation of the statute is unwritten and, consequently, indefinite. The provisions of a properly promulgated rule are known or knowable based on the language of its express terms. In fact, the MAPA requires that promulgated rules adhere to certain forms and be published. [Citation omitted.] But the precise terms of PERA's interpretation of section 353.01, subdivision 10, are unwritten and unpublished and, thus, impossible to discern. Third, PERA's interpretation has been inconsistent over time. The evidence presented to the ALJ demonstrates that the city received conflicting answers from PERA staff regarding whether the city's salary-supplement payments are within the statutory definition of PERA salary.[4]

5. [T]he letter from a PERA staff member to the City of St. Paul in 2004 does not establish a longstanding interpretation of the statute that supports PERA's decision to exclude the city's salary-supplement payments from PERA salary.[5]

6. In March 2009, PERA sent letters to 485 active and retired employees, advising them that "PERA staff has determined that certain amounts reported to our association as 'salary' by [the city] cannot be used for purposes of calculating retirement plan contributions or benefits." PERA's letters advised each employee or retiree of the total amount of contributions that had been improperly withheld during employment and, thus, would be refunded. PERA's letters also advised each retiree of a downward

[1] 820 N.W.2d at 566.
[2] *Id*. at 567.
[3] *Id*. at 568.
[4] 820 N.W.2d at 572.
[5] 820 N.W.2d at 573.

adjustment to his or her monthly retirement annuity payment, as well as the amount of overpaid benefits that they would be required to repay.[6]

7. Seventy current and former city employees filed petitions for review by the PERA Board of Trustees. [Citation omitted.] The PERA board referred the petitions to the Office of Administrative Hearings for contested-case proceedings before an administrative law judge (ALJ). * * * The petitioners argued that PERA had erred by interpreting section 353.01, subdivision 10, to exclude the supplemental payments from their PERA salary.[7]

8. On August 13, 2009, PERA filed a petition for consolidation of all seventy pending contested case proceedings. The ALJ ruled on that petition during a prehearing conference on August 21, 2009. Finding that all seventy contested case proceedings involved common questions of law and possibly common questions of fact, the ALJ ordered them consolidated for adjudication of those issues. They were also consolidated for purposes of discovery and the filing and disposition of any dispositive motions.[8]

9. The ALJ also granted PERA leave to add similarly situated retired or active City employees as parties to the consolidated proceeding by initiating separate contested case proceedings and serving those parties with notices of hearing. However, PERA stated for the record that upon final adjudication of the issues, it planned to accord City employees who had not filed petitions for review the same treatment as those who had filed Petitions for Review. PERA therefore indicated that it was unlikely that it would seek to add additional parties.[9]

10. In his final report to the PERA Board of Trustees, the ALJ reached the following Conclusions, among others:

> 10. An agency policy that makes specific a statute enforced or administered by the agency is an interpretive rule that must be promulgated in accordance with Minnesota Statutes, Chapter 14, unless the policy simply corresponds with the plain meaning of the statute at issue. However, if an agency policy purports to interpret ambiguous governing legislation, the agency need not engage in formal rulemaking if its interpretation is long standing.
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> 11. The City's contributions to family-dependent hospital-medical premiums are "employer-paid amounts used by an employee toward the cost of insurance coverage" within the meaning of Minn. Stat. § 353.01, subd. 10(b) (2). PERA's policy of excluding the City's contributions to family-dependent hospital-medical premiums from PERA salary

[6] *Id*.
[7] *Id*.
[8] OAH No. 4-3600-20809-2, January 11, 2011 ("ALJ decision") at pp. 4-5.
[9] *Id*.

corresponds with the plain meaning of Minn. Stat. § 353.01, subd. 10(b)(2), and is therefore not an interpretive rule.

12. Minn. Stat. § 353.01, subd. 10, is ambiguous about whether employer contributions to deferred compensation plans are excluded from PERA salary. Interpreting Minn. Stat. § 353.01, subd. 10, to exclude employer-paid deferred compensation is a correct resolution of that ambiguity. However, PERA's application of that interpretation represents enforcement of an interpretive rule, and that interpretation does not qualify as long standing. PERA may therefore not enforce that interpretation when recalculating the retirement benefits of City employees.[10]

11. In its final decision, the PERA Board of Trustees accepted ALJ Conclusion 11 but rejected ALJ Conclusions 10 and 12.

CONCLUSIONS

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

1. The Administrative Law Judge has jurisdiction of this proceeding pursuant to Minn. Stat. § 15.472.

2. The Application in this matter was properly filed, and all procedural requirements of law or rule have been fulfilled. This matter is therefore properly before the Administrative Law Judge.

3. The Petitioners are "parties," within the meaning of Minn. Stat. § 15.471, subd. 6, and may therefore file an application for fees and expenses pursuant to Minn. Stat. § 15.472(a).

4. The position of PERA in the underlying consolidated proceeding—OAH No. 4-3600-20809-2—was not "substantially justified" within the meaning of Minn. Stat. § 15.472(a) and Minn. Stat. § 15.471, subd. 8.

5. The Petitioners were "prevailing parties" within the meaning of Minn. Stat. § 15.472(a).

6. The Petitioners are therefore entitled to an award of fees and expenses pursuant to Minn. Stat. §§ 15.471—15.474.

7. These Conclusions are reached for the reasons discussed in the Memorandum that follows, which is hereby incorporated into these Conclusions.

[10] ALJ Decision at pp. 40-41.

Based upon these Conclusions, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED,

(1) That the Application of Petitioner Douglas Michog for fees and other expenses pursuant to Minn. Stat. § 15.472(a) is **GRANTED**; and

(2) That a hearing to determine the amount of fees and other expenses to which the Petitioners may be entitled will be conducted at 1:00 p.m. on Monday, January 7, 2012, at the Office of Administrative Hearings, or on such other date as may be determined by the Administrative Law Judge.

Dated: December 21, 2012

s/Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

Digitally recorded; no transcript prepared

MEMORANDUM

I. Prior Proceedings

On January 18, 2011, the ALJ issued Findings of Fact, Conclusions and Recommendations to the PERA Board of Trustees in the underlying contested case proceeding. The PERA Board of Trustees subsequently issued Findings of Fact, Conclusions and an Order in that proceeding. The Petitioners appealed that decision to the Minnesota Court of Appeals. On August 6, 2012, the Court of Appeals issued the following decision:

> The PERA board erred by adjusting relators' contributions and benefits and by recouping overpayments of benefits based on the city's salary-supplement payments. The PERA board may not rely on its purported longstanding interpretation of the statute and, thus, may not make adjustments to contributions and benefits based on the salary-supplement payments. The PERA board did not err by adjusting relators' contributions and benefits and in recouping overpayments of benefits based on the city's insurance-supplement payments. On remand, the PERA board shall modify its adjustments to relators' contributions and benefits and shall modify its recoupment of overpayments of benefits so as to ensure that the city's salary-supplement payments to relators are included in the calculation of relators' so-called “PERA salary.” The PERA board also shall reconsider whether relators are entitled to attorney fees.

On remand, both the PERA Board and the Petitioners agreed that there was no process under Minn. Stat. § 15.472 ("MEAJA") for *an agency*, such as PERA, to adjudicate an application for fees and expenses under the MEAJA. Rather, only a court or an administrative law judge had jurisdiction to adjudicate applications made pursuant to Minn. Stat. § 15.472(a).

Accordingly, on September 17, 2012, Petitioner Douglas Michog, acting on behalf of all the Petitioners, filed an application for fees and expenses pursuant to Minn. Stat. § 14.472(a) with the Office of Administrative Hearings ("OAH"). The application was referred to this ALJ for hearing and adjudication. On October 1, 2012, PERA filed objections to the application. The Petitioners filed a Reply Memorandum and additional supporting Affidavits on November 1, 2012.

The ALJ convened a hearing on the Petitioners' application on November 28, 2012. Prior to the hearing, the parties had stipulated that no genuine issues of material fact existed, and that the hearing could be limited to disputed issues of law. However, during the hearing it appeared that there was an insufficient evidentiary record to determine the amounts of any recoverable fees and expenses. The ALJ therefore bifurcated the hearing into two stages—the first to determine whether the Petitioners were entitled, as a matter of law, to an award of any fees and expenses; then, if so, a second hearing to determine the amounts of recoverable fees and expenses. The Petitioners' application is now before the ALJ to determine whether, as a matter of law, the Petitioners are entitled to any award pursuant to Minn. Stat. § 15.472(a).

II. Definition of "Party"

The MEAJA[11] affords the right to recover fees and expenses to certain eligible parties who prevail in civil court actions and administrative hearings involving the State and its agencies . Minn. Stat. § 15.471, subd. 6, defines who those eligible parties are:

> Subd. 6 **Party.** (a) Except as modified by paragraph (b), "party" means a person named or admitted as a party, or seeking and entitled to be admitted as a party, in a court action or contested case proceeding, or a person admitted by an administrative law judge for limited purposes, and who is:
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> (1) an unincorporated business, partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed or the contested case proceeding was initiated; and
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> (2) an unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed $7,000,000 at the time the civil action was filed or the contested case proceeding was initiated.

[11] The MEAJA was originally codified as Minn. Stat. §§ 3.761—3.765 (*See* Act of Mar. 19, 1986, 1986 Laws ch. 377, §§ 1-7.). In 1992, the Act was recodified, without substantive changes as Minn. Stat. §§ 15.471—15.475, with the section defining "party" renumbered as Minn. Stat. § 15.471, subd. 6.

(b) "Party" also includes a partner, officer, shareholder, member, or owner of an entity described in paragraph (a), clauses (1) and (2).

(c) "Party" does not include a person providing services pursuant to licensure or reimbursement on a cost basis by the Department of Health or the Department of Human Services, when that person is named or admitted or seeking to be admitted as a party in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services.

The MEAJA was enacted in 1986. Since then, there have been several reported cases further construing the definition of "party" in a number of different contexts. PERA argues that the cases have generally interpreted the term "party" narrowly—that is, they have generally restricted eligible parties to entities or persons whose underlying claims arise out of their direct involvement with some type of small business. On the other hand, the Petitioners argue that weight of authority requires a broad view of eligible parties, and that they include any party whose underlying claims arise out of his or her direct involvement with any of the identified in paragraph (b). PERA concedes that some "decisions have broadened [the meaning of party] a little," but argues that the cases allowing persons without ownership interests in small businesses are all distinguishable from the instant case. For the reasons discussed below, the ALJ concludes that the weight of authority favors the Petitioners' broader interpretation of the term "party."

The Court of Appeals first construed the term "party" shortly after the MEAJA was enacted in 1986.[12] *McMains v. Commissioner of Public Safety* ("*McMains*"), involved a motorist's appeal of the revocation of his driver's license under Minnesota's implied consent law. The district court reinstated the motorist's license but declined to award him attorney fees under the MEAJA. The motorist appealed the denial of attorney fees, arguing that the revocation was not substantially justified within the meaning of the Act. But the Court of Appeals never reached that issue. Rather, it first concluded that that the motorist was not a "party" eligible to receive an award. The Commissioner and the motorist had both argued that subdivision 6 was "unambiguous." The motorist argued that the expansive provisions in then Minn. Stat. § 3.761, subd. 6(a), which allowed applications by "a person named or admitted as a party, or seeking and entitled as of right to be admitted as a party" alone governed eligibility. He had neither alleged nor demonstrated any nexus to the entities described in subdivision 6(b), arguing that those more narrow criteria were merely illustrative and not determinative. The Commissioner contended that the plain language of subdivision 6 did not permit a construction that the MEAJA broadly applied to any party in civil litigation or contested case proceedings involving the state. The Court of Appeals agreed and concluded that the more limiting criteria in subdivision 6(b) unambiguously applied to all persons qualifying as parties in subdivision 6(a). Without a nexus to any of the entities described in subdivision 6(a), an applicant is not eligible for a fee award. In so ruling, the court relied on Minn. Stat. § 645.16, which provides, in part:

[12] 409 N.W.2d 911 (Minn. App. 1987)

> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

The Court of Appeals then indicated hypothetically that "we conclude that *if we dealt with any ambiguity in the language of the subdivision*, the same result is reached."[13] [Emphasis supplied.] It discussed the legislature's emphasis on small businesses in committee reports, journal entries and tape recordings of legislative testimony and discussion. However, the Court's further discussion of legislative history was unnecessary to the result. As the Minnesota Supreme Court has ruled, "if the words of the statute are 'clear and free from all ambiguity,' further construction is neither necessary nor permitted."[14] Accordingly, PERA's reliance on *McMains* for the proposition that MEAJA is primarily available only to small businesses, their shareholder or owners, is misplaced. That case only held that a party seeking a MEAJA award, must meet the additional criteria in Minn. Stat. § 3.761, subd. 6,[15] and that the applicant in that case did not meet those criteria.

Two years later, the Court of Appeals again interpreted the term of "party," as used in the MEAJA. *Snider v. State* ("*Snider*"),[16] involved a class action by fifty-five taxpayers claiming the state had wrongfully withheld taxes due when the Department of Transportation acquired their land. In a prior mediation, the state had conceded liability and the parties went to trial on the issue of damages. The taxpayers applied under the MEAJA for an award of fees and expenses, and the trial court granted them an award of $25,000. The state appealed the MEAJA award, contending that being a member of a certified class did not constitute being a member of an "association or organization," within the meaning of subdivision 6(b). It argued that the only eligible organizations under the Act were ones "where members were joined together to conduct business."[17] Citing Minn. Stat. § 645.08(1), the taxpayers argued that the class of which the taxpayers were members was an association or organization "according to their common and approved usage" of those words. Accordingly, the words of the statute were "clear and free from all ambiguity" and further construction to determine what the legislature's underlying intent might have been was "neither necessary nor permitted."[18] The Court of Appeals agreed with the taxpayers. It found that the dictionary definition of "association"— "a number of persons uniting together for some special purpose"—to be unambiguously inclusive of the class of which the taxpayers were members.[19] Similarly, the court found that the taxpayers' class unambiguously met the definition of an "organization"—namely, "two or more persons having a joint or common interest."[20] Having made those determinations, the Court of Appeals reversed the trial court's denial of an attorney fee and cost award. It is notable that, unlike *McMains*, the court in

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[13] *Id*. at 914.
[14] *Owens v. Water Gremlin Co*., *605 N.W.2d 733, 736; (Minn. 2000).*
[15] Renumbered as Minn. Stat. § 14.471, subd. 6(b).
[16] 445 N.W.2d 578 (Minn. App. 1989).
[17] *Id*. at 581.
[18] *See*, *Owens v. Water Gremlin Co*., *supra*, *605 N.W.2d at 736.*
[19] *Snider v. State*, *supra*, 445 N.W.2d at 578.
[20] *Id*.

Snider considered the plain language of Subdivision 6 to be so clear and free from ambiguity that it found it unnecessary even to discuss what the legislature's underlying intent might have been when it enacted the MEAJA.

The holdings in *McMains* and *Snider* are consistent. Both are published and therefore constitute authority. The remaining cases that construe the term "party" have been consistent with the principles set forth in those two cases. *Helgeson v. Commissioner of Revenue* ("*Helgeson*")[21] involved a challenge to a ruling by the Commissioner that the taxpayers did not have a sufficient interest in a subchapter S corporation and a partnership to enable them to deduct the losses sustained by those businesses on the taxpayers' individual tax returns. The auditor had only audited the taxpayers' individual returns and not the returns of the subchapter S corporation and the partnership in question. In addition to appealing the merits of the Commissioner's ruling, the taxpayers applied to the Tax Court for an award of attorney fees and costs under the MEAJA. The Commissioner argued that the taxpayers were not parties within the meaning of MEAJA because the case only involved their individual tax returns and not the returns of the businesses in question. The Tax Court ruled that because the taxpayers were shareholders and owners of small businesses, as described in the MEAJA, they therefore qualified as "parties" under the Act.[22] *Helgeson* did not actually raise the question of whether the legislature intended to limit awards under MEAJA to small business. The Tax Court again simply applied the plain meaning of Minn. Stat. § 15.471, subd. 6(b), which provides that "[p]arty also includes a partner, officer, shareholder, member, or owner of an entity described in paragraph (a), clauses (1) and (2)."

In *Campaign Finance and Public Disclosure Board v. Minnesota Democratic-Farmer-Labor Party* ("*Campaign Finance Board*"),[23] the Board sought a declaratory judgment to compel the DFL party to allocate to several candidates expenditures that primarily benefited only one of them. The district court granted summary judgment in favor of the DFL party and granted its application for attorney fees and costs pursuant to the MEAJA. In addition to appealing the granting of summary judgment, the Board also appealed the attorney fees award. What is significant about the case is that the Board only challenged the district court's conclusion that "the position of the state was not substantially justified" within the meaning of Minn. Stat. § 15.472(a). The Board did not dispute the conclusion that the DFL party was a "party" within the meaning of Minn. Stat. § 15.471, subd. 6.

PERA also relies on *Indep. Sch. Distr. No. 709, Duluth v. State*,[24] ("*ISD 709*") and *Rosckes v. County of Carver*,[25] ("*Rosckes*"), as support for an interpretation that only parties whose underlying claims involve participation in a small business are eligible to apply for attorney fee awards under MEAJA. However, in *ISD 709*, the court simply cited *McMains* as authority for the result—that an individual who has no connection with

[21] 2001 WL 197269 (Minn. Tax 2001).
[22] *Id*. at 11.
[23] 671 N.W.2d 894 (Minn. App. 2003).
[24] 1991 WL 46559 (Minn. App. 1991).
[25] 783 N.W.2d 220 (Minn. App. 2010).

one of the entities described in Minn. Stat. § 15.471, subd. 6(b) case is not a "party" for purposes of the MEAJA.[26] *Rosckes* is the only case that appears to lend some support to PERA's narrower interpretation of "party." There, the Court of Appeals rejected a claim for fees under MEAJA by the personal representative of a deceased medical assistance ("MA") applicant who had appealed denial of an MA award. The court first concluded that the position of the state was substantially justified, which in itself precluded an award. It then added parenthetically that "this court [had] interpreted 'party' as used in section 15.472(a) to exclude individuals, observing that that the statute 'was targeted specifically toward small business.'"[27] First, the Court's inquiry into the appellant's status as a party was unnecessary to the result and was therefore *dicta*. Second, "targeted specifically toward small business" is not necessarily a conclusion that awards under MEAJA are *limited* to persons whose underlying claims arise out of their involvement with small businesses. When read in that light, *Rosckes* is consistent with all of the other cases interpreting the term "party."

Finally, as further support for its interpretation of "party," PERA argues that because the MEAJA represents a limited waiver of sovereign immunity, its language must be "narrowly construed."[28] It contends that this principle requires rejection of the Petitioners' broader view of parties eligible for fee awards. However, the principle of construction to which PERA refers actually provides that a statutory waiver of immunity should be "strictly," and not necessarily "narrowly," construed.[29] As discussed above, strict construction requires that the unambiguous language of Minn. Stat. § 15.471, subd. 6(b) not be "disregarded" in favor of a narrower construction suggested by some of its legislative history.[30]

III. The Petitioners are "parties" within the meaning of Minn. Stat. § 15.471, subd. 6.

A. PERA's recalculations arose as a direct result of the Petitioners' membership in city employee unions.

PERA argues that unlike other cases, there is no connection here "between the 'association' or 'organization' and the underlying individual action."[31] It suggests that allowing the Petitioners "party" status here would open the door to allowing fee awards upon a mere showing of a relationship with any kind of organization.[32] The ALJ disagrees. The Petitioners are seventy of the 485 members of five city employee unions who were employed by the City from 1995 through September 2007. PERA initiated its recalculations because of provisions contained in collective bargaining agreements ("CBAs") that those unions negotiated on behalf of the Petitioners during

[26] 783 N.W.2d at 220.
[27] 1991 WL 46559 at 2.
[28] PERA's post-hearing submission at p. 2.
[29] *Donovan Contracting of St. Cloud, Inc. v. Minn. Dept. of Transportation*, 469 N.W.2d 718, 720 (Minn. App. 1993).
[30] Minn. Stat. § 645.16; *see also*, *Owens v. Water Gremlin Co*., *supra*, *605 N.W.2d at 736.*
[31] PERA's post-hearing submission at p. 4.
[32] *Id*. at p. 3.

that period. Without those bargained contract provisions there would have been no recalculation of Petitioners' pension benefits. In other words, PERA's recalculations occurred as a direct result of the Petitioners' membership in labor unions, which are clearly "associations" within the meaning of Minn. Stat. § 15.471, subd. 6. Thus, like the cases in which the applicants were held to be "parties" for purposes of the MEAJA, there was a clear nexus here between the merits of the underlying proceeding and the Petitioners' membership in an entity described in Minn. Stat. § 15.471, subd. 6(b).

B. The Petitioners were, in effect, also parties in a class action.

Additionally, the Petitioners' status here is identical to that of the applicants in *Snider*,[33] who were class members of a certified class in a class action in district court. The Court of Appeals held in *Snider* that because of that status, the applicants "parties" within the meaning of Minn. Stat. § 15.41, subd. 6. PERA argues that the holding in *Snider* does not apply here because:

> the individuals here whose actions were later consolidated were not united or joined at the time the contested case was initiated, and consolidation did not change the nature of the underlying individual actions.[34]

However, PERA's position exalts form over substance. The only reason that the two cases are not completely indistinguishable is that *Snider* involved civil litigation in district court and this case involved a quasi-judicial administrative appeal.

PERA initiated this proceeding under Minn. Stat. § 356.96, the exclusive appeal process for retirees to challenge determinations by state pension plans that affect their pension benefits. In other words, PERA could not have initiated this case as a class action in district court. Class actions in the judicial system are governed by Minn. R. Civ. P. 23. But, there is no comparable process in the administrative justice system. Nonetheless, this proceeding was functionally the same as if the case had been heard as a class action in district court.

Here, PERA identified the Petitioners in the Notices of Hearing as members of a clearly identifiable class—that is, all "Retired and Active Employees of the City of Duluth." As discussed above, that class consisted of all the 485 members of five city employee unions who were employed by the City from 1995 through September 2007.

PERA also contemplated proceedings in this matter that would be in the nature of a class action. For example, it styled the captions of each of its individual notices of hearings in the name of a class—i.e., "Retired and Active Employees of the City of Duluth"—as well as in the name of each Petitioner, rather than just in the name of the Petitioner. Soon after PERA filed and served the notices of hearing, it filed a petition to consolidate all seventy matters in a single proceeding. Minn. R. Civ. P. 23.01 sets out the prerequisites for a class action:

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[33] *Supra*, 445 N.W.2d 578.
[34] PERA's post-hearing submission at p. 4.

> One or more members of a class may sue or be sued as representative parties on behalf of all only if
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> (a) the class is so numerous that joinder of all members is impracticable;
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> (b) there are questions of law or fact common to the class;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (d) the representative parties will fairly and adequately protect the interests of the class.

All these prerequisites exist in this case, as the ALJ found at the prehearing conference on August 21, 2009. On that basis, the ALJ issued an order consolidating all seventy individual proceedings for hearing and adjudication of the common issues. The subsequent records of the underlying proceeding confirm that the prerequisites for a class action existed. The validity of all PERA's recalculations turned almost exclusively on questions of law. Once the law became settled, the primary individual questions of fact—namely, what the actual amount of each retiree's monthly benefit would be—was largely a matter of arithmetic. In fact, no retired or active retiree has yet challenged the recalculation on remand of his or her individual benefits.

Finally, and perhaps most important, at the prehearing conference PERA made an oral stipulation for the record that gave this proceeding the same legal effect that a class action provides. PERA stated that upon final adjudication of the issues, it planned to accord any City employees who had not filed petitions for review the same treatment as those who had filed Petitions for Review. There is nothing in Minn. Stat. § 15.471, subd. 6, that suggests that the legislature intended to differentiate between similarly situated litigants based on procedural differences in the judicial and administrative justice systems.

In summary and for both of the reasons discussed above, the ALJ concludes that the Petitioners are "parties" within the meaning of Minn. Stat. § 15.471, subd. 6.

IV. PERA's Position Was Not Substantially Justified.

Minn. Stat. § 15.472(a) provides that an otherwise eligible party may only recover an award of fees and expenses if that party "shows that the position of the state was not substantially justified." Minn. Stat. § 15.471, subd. 8, defines "substantially justified" as:

> 'Substantially justified' means that the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding.

PERA argues that an overarching factor in the " totality of circumstances" must be due regard for PERA's legal duty "to adjust any annuity or benefit and to recover any overpayment made due to an invalid service or salary. However, an aspect of the

totality of circumstances that PERA omits to mention is the obligation of state agencies to members of the public to give them fair notice of agency policies and interpretations of statutes that will materially affect their rights and interests. That obligation is implicit in the legislature's definition of "rule":

> "Rule" means *every agency statement of general applicability and future effect*, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.[35] [Emphasis supplied.]

Quoting the Minnesota Supreme Court, the Court of Appeals recognized in this case that administrative "notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.'"[36] Here, the Court of Appeals held that PERA's interpretation of Minn. Stat. § 353.01, subd. 10, was, in effect, an interpretive rule. PERA has rulemaking authority but chose not to promulgate its interpretation as a formal rule before the agency began applying it. Had PERA done so, both the City and its employees would have clearly understood from the outset the consequences of including the "deferred compensation" arrangement in CBAs.

Even if an agency does not formally promulgate its interpretation of a statute by rulemaking, an agency can still enforce it if its interpretation is "longstanding."[37] In arguing that PERA's position was substantially justified, PERA cites affidavit evidence of it Executive Director and testimony of its Manager of Account Information that they both had long understood that the salary supplements at issue did not constitute PERA salary. The problem is that they never adequately communicated their own understandings to the political subdivisions and public employees who would be affected by the interpretations—that is, PERA failed to give affected parties fair notice before enforcing that interpretation.

In fact, the Court of Appeal's found that "PERA's purported longstanding interpretation of the statute was of uncertain origin"; that "the precise terms of PERA's [were] unwritten and unpublished and, thus, impossible to discern"; and that "PERA's interpretation has been inconsistent over time."[38] The evidence also established that "the city received conflicting answers from PERA staff regarding whether the city's salary-supplement payments are within the statutory definition of PERA salary."[39] In *Donovan Contracting of St. Cloud v. Minnesota Department of Transportation*,[40] the Court of Appeals concluded that the agency's position was not substantially justified, within the meaning of Minn. Stat. § 15.472(a), even when the Department had *informally*

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[35] Minn. Stat. § 14.02, subd. 4.
[36] 820 N.W.2d at 572.
[37] 820 N.W. at 571.
[38] *Id*. at 572.
[39] *Id*. at 573.
[40] 469 N.W.2d 718 (Minn. App. 1991), *review denied*, (August 2, 1991).

promulgated an addendum interpreting the prevailing wage statute to affected contractors before attempting to enforce it.

In summary, what makes PERA's position substantially unjustified is not that the agency relied on what it considered to be a longstanding interpretation , but that it did so in a way that it deprived the City and its employees of fair notice of the standards to which they would be held. In so doing, PERA, in effect, created a trap for the unwary.

V. The Petitioners Were Prevailing Parties.

To be eligible for an award of fees and expenses under MEAJA, one must be "a prevailing party other than the state.[41] The statute refers to *a* prevailing party, rather than *the* prevailing party. Therefore, a party who only partially prevails may be eligible for an award of fees. In its decision on appeal, the Court of Appeals recognized that as partially prevailing parties, the Petitioners might be entitled to an award of fees and expenses if they meet the other eligibility criteria in the MEAJA:

> Relators were not the prevailing parties in the administrative review proceedings that led to the PERA board's decision. But relators have prevailed, in part, in this court. In light of relators' partial success on appeal, the PERA board on remand should reconsider whether relators are entitled to attorney fees pursuant to section 15.472(a).[42]

PERA does not appear to dispute that, if otherwise eligible, the Petitioners could recover some of their attorney fees and expenses. Rather, because they only partially prevailed, they would not be entitled to recover all of those fees and expenses. At the hearing, the parties agreed that there was not yet an sufficient factual record available from which to calculate a partial award of fees and expenses. The ALJ is therefore withholding a ruling on the amount of the fee award pending a further hearing on that issue.

VI. Conclusion

In summary, the ALJ concludes that the Petitioners are "parties" within the meaning of Minn. Stat. § 15.471, subd.6; that they are also "prevailing parties" within the meaning of Minn. Stat. § 15.472; and that PERA's position in the underlying proceeding was not "substantially justified" within the meaning of Minn. Stat. §§ 15.472 and 15.471, subd.8. The Petitioners are therefore entitled to an award of fees and expenses under the MEAJA, and their application must be granted.

B. H. J.

[41] Minn. Stat. § 15.472(a).
[42] 820 N.W.2d at 576.